

The Evolution of 10 U.S.C. 2320, 2321, and Related Legislation: 1984-2015

Jon Etherton
Senior Fellow for Acquisition Reform
National Defense Industrial Association

October 27, 2016

- **P. L. 98-525, October 19, 1984**
- **Title XII, Defense Procurement Reform Act of 1984**
- **Section 1216 included new sections 2320 and 2321 in title 10.**
- **10 U.S.C. 2320 – Rights in technical data**
 - Requirement to define legitimate proprietary interest of DoD and industry in the FAR considering:
 - Source of funding
 - Policy on supporting small business innovation
 - Need for competition and lowering prices by developing alternative sources of supply

- **10 U.S.C 2321 - Validation of proprietary data restrictions**
 - Authorized the government to challenge assertions by a contractor restricting the ability of the DoD to use technical data delivered under a contract.
 - Prescribed a process for determining the validity of a contractor's asserted restrictions with fees and liabilities for both parties.
- **10 U.S.C. 2305 – Contracts: planning, solicitation, evaluation, and award procedures**
 - Amended in section 1213 by adding a new subsection (d) authorizing the DoD to require in a solicitation proposals to provide the DoD the right to use technical data to be provided under a contract for purposes of competitive procurement of an item with any associated cost of acquiring and the right to use such data.

- **10 USC 2320 and 2321 have each been amended eleven different times since 1984.**
 - In the case of 10 USC 2320, eight of the sets of amendments have resulted in significant changes.
 - In the case of 10 USC 2321, seven of the sets of amendments have resulted in significant changes.

- **P.L. 99-661, November 14, 1986**
- **Issues**
 - Proposed DFARS rule issued in September 1985 raised issues around treatment of the meaning of “developed” and “private expense”.
 - Navy and Air Force data rights clauses required contractors to sell or relinquish rights as a condition of contract award.
 - June 1986 Packard Commission report generally favorable to innovation and commercial item acquisition.
- **Section 953 – Amended 10 U.S.C. 2320 and 2321.**
 - Applied to contracts entered into 210 days after the date of enactment.

- **10 U.S.C. 2320**

- Retained the basic structure and requirement for regulations.
- Specified rights in data according to sources of funds.
- Prohibited requiring a contractor to relinquish rights in data as a condition of being responsive to a solicitation (with limited exceptions).
- Required that the terms “developed” and “private expense” be defined in regulation.

- **10 U.S.C. 2321**

- Limited the period of DoD challenge to a contractor assertion of restrictions on the right of the DoD to release or disclose data delivered under a contract to the three-year period after the final payment under the contract or the date on which the data is delivered, whichever is later.

- **P. L. 180-180, December 4, 1987**
- **Section 808 amended 10 U.S.C. 2320**
 - Limited the ability of the regulations to limit license or royalty rights otherwise granted by law.
 - Added to the list of cases in which a contractor may not be found non-responsive to a solicitation cases in which a contractor does not refrain from offering an item where the contractor has the ability to restrict rights in data.
 - Authorized the Secretary of Defense to forgo negotiation of rights in mixed funding cases if he determined, based on criteria specified in regulation, that such negotiations would be impracticable.
 - Required that the terms “exclusively with Federal funds” and “exclusively at private expense” be defined in regulation.
 - Required that IR&D/B&P be considered as private expense funding.
 - Made the changes effective no later than 120 days after the date of enactment of the bill.

- **P.L. 100-456, September 28, 1988**
- **Section 806 amended 10 U.S.C. 2305(d).**
 - Prohibited the DoD from requiring proposals to enable the future competitive procurement of an identical item if the item was developed exclusively at private expense except in limited cases.
 - Added general statement that any negotiation objective involving rights in data may not impair the rights of prospective contractors or subcontractors provided by law.

- **P.L. 102-113, December 5, 1991**
- **Perception that the regulatory process in DoD was stalled.**
 - Interim DFARS rules issued in April 1988, replaced by another in November 1988
 - ANPR published in October 1990 with no implementation.
- **Section 807 Government-Industry Committee on Rights in Technical Data**
 - Requirement for final regulations by September 15, 1992 with thorough consideration to be given the recommendations of the panel.
- **Final report issued in disagreement in April 1994 and regulations issued in 1995.**

- **P.L. 103-355, October 13, 1994**
- **Section 8106 amended 10 U.S.C. 2321.**
 - Established a presumption that a commercial item was developed exclusively at private expense for purposes of validating a contractor assertion of restriction on the DoD disclosure or release of data delivered under a contract.

- **P.L. 109-364, October 17, 2006**
- **Section 802 amended 10 U.S.C. 2320 and 2321.**
- **10 U.S.C. 2320**
 - Required program managers for major weapon systems and systems to conduct an early, long-term assessment of technical data needs and to establish corresponding acquisition strategies that provide for technical data rights needed to sustain such systems and subsystems over their life cycle.
- **10 U.S.C. 2321**
 - Reversed the presumption that a commercial item was developed exclusively at private expense in the case of a major system, subsystem or component thereof.

- **P.L. 111-84, October 28, 2009**
- **Section 821 amended 10 U.S.C. 2320.**
 - Authorized covered government support contracts access to and use of technical data delivered under a contract for the sole purpose of furnishing advice or technical assistance directly to the government.

- **P.L. 111-383, January 7, 2011**
- **Section 824 amended 10 U.S.C. 2320 and 2321.**
- **10 U.S.C. 2320**
 - Authorized contractors to be required to relinquish rights in data as a condition of being responsive to a solicitation in cases where a use or release restriction has been erroneously asserted for data pertaining to an item developed with Federal funds.
 - For purposes of establishing rights in data, deemed IR&D to be Federal funds in cases where a contractor used no other private expense funds in the development of an item or process.

- **10 U.S.C. 2321**

- Removed any time limit on the ability of the DoD to challenge a contractor assertion of a restriction on the use or release of data delivered under a contract in cases where the DoD finds that reasonable grounds exist to believe that a contractor has made an erroneous assertion.

- **P.L. 112-81, December 31, 2011**
- **Sec 815 amended 10 U.S.C. 2320 and 2321.**
- **10 U.S.C. 2320**
 - Authorized the DoD to release proprietary data that is so-called interface data that is necessary for the segregation and/or reintegration of an item or process (or their equivalents) with other items or processes
 - Inserted a statement granting the United States government purpose rights in items or processes developed in part with Federal funds and in part at private expense
 - Restored the historical treatment of IR&D/B&P as private expense funding in all cases in the determination of rights in data.
 - Provided new authority allowing the DoD, notwithstanding any other contract delivery requirement, to require the delivery at any time of technical data generated or utilized in the performance of a contract and to compensate the contractor only for the reasonable costs of converting and delivering it in the following case:
 - Upon a determination that the data is needed for reprocurement, sustainment, modification or upgrade (including through competitive means of a major system, weapon systems, subsystem thereof, or any non-commercial item or process that is either pertains to a mixed funding item or is necessary for the segregation and/or reintegration of the item or process with other items or processes.

- **10 U.S.C. 2321**

- Extended to six years from three years the time period during which DoD could challenge a contractor assertion of a restriction on the use or disclosure of data delivered under a contract.

- **P.L. 114-92, November 25, 2015**
- **Section 813 amended 10 U.S.C. 2321.**
 - Expanded the presumption that a commercial item was developed solely at private expense to cases of:
 - A commercial subsystem or component of a major system if the major system was acquired as a commercial item;
 - A component of a subsystem that was acquired as a commercial item; and
 - COTS components or COTS items with modifications customarily available in the commercial marketplace or with minor modifications for government.